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# Toward a Law of Damages

Robert J. Nordstrom

*The concepts explored herein will be incorporated in the first chapter of a textbook on damages which Professor Nordstrom is co-authoring and will help to place the prevailing law of damages in historical perspective. After tracing the development of damage theories from pre-Roman times in which reparation for a wrongfully inflicted injury took the form of "outlawry" to the present-day ad hoc determination of monetary relief, the author sets forth the rationale for the Anglo-American jurisprudential commitment to the principle of compensation rather than punishment, to the flexibility of jury awards, and to control by courts over unreasonable jury verdicts.*

THE MODERN LAWYER accepts, with but few questions, a legal system in which relief by way of compensatory damages is the norm.<sup>1</sup> Those questions which are raised usually focus on a comparison of the benefits of specific relief<sup>2</sup> with those of a monetary award; from time to time, cases and statutes suggest that in particular situations specific relief is to be preferred to damages.<sup>3</sup> However, these suggestions do not challenge the role of compensatory damages as the basic remedy in the vast number of tort and contract actions. Nor is such a challenge made

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<sup>1</sup> The term "compensatory damages" is generally reserved to denote money recoveries measured, in contract actions, by the expected gains from the contract and, in tort actions, by the losses that had been sustained by the injured party either personally or through his property interests. See MCCORMICK, DAMAGES 560-62 (1935); PROSSER, TORTS §§ 1-6 (3d ed. 1964). See also the arrangement of volumes 5 and 5A CORBIN, CONTRACTS (1964) and the arrangement of RESTATEMENT, CONTRACTS §§ 327-57 (1932). However, for the purpose of this article, the term "compensatory damages" is considered more broadly so as to include all monetary recoveries, other than those designed to punish the wrongdoer, which are measured either as indicated above or by restitutionary or reliance interests. There is at least this justification for the broader usage: none of these recoveries has as its primary purpose the punishment of the wrongdoer. See Fuller & Perdue, *The Reliance Interest in Contract Damages* (pts. 1-2), 46 YALE L.J. 52, 373 (1936).

<sup>2</sup> The one area in which specific relief is given as a matter of course involves the enforcement of contracts for the sale of land. *Gartrell v. Stafford*, 12 Neb. 545, 11 N.W. 732 (1882) (suit by the purchaser); *Spring v. Sanders*, 62 N.C. 67 (1866) (suit by the vendor). See cases cited in 5A CORBIN, *op. cit. supra* note 1, §§ 1143, 1145 (1964).

<sup>3</sup> See, e.g., UNIFORM COMMERCIAL CODE § 2-716(1), comment 1, which asserts that "this Article seeks to further a more liberal attitude than some courts have shown in connection with the specific performance of contracts of sale." Comment 2 to the same section expands this idea.

in this article, because the concept of awarding compensatory damages for the wrongful invasion of a legal right represents both maturity and wisdom in a legal system.

## I. FROM OUTLAWRY TO BOT

Undoubtedly, every civilization has worked out some method for granting a kind of relief to a person who was injured through the wrongful activity of another. These civilizations, with their differing mores, have disagreed as to what constituted a "wrongful activity";<sup>4</sup> they also employed what now appear to be rather crude types of relief. Sometimes, early relief was by way of outlawry — that is, the person who was guilty of that which society defined as an unlawful activity was literally outside the law, and anyone in the community could seek vengeance against the guilty party without fear of punishment by the law.<sup>5</sup> Gradually, outlawry was replaced by pecuniary payments made by the wrongdoer to satisfy the wronged person's right of revenge.<sup>6</sup> This procedure developed into a system of relief by penalty, in which the performance of a proscribed act called for a prescribed payment to the injured. Since money was uncommon, the payment was often in terms of chattels.<sup>7</sup>

### A. *Impact of Roman Law*

The Romans developed an elaborate legal system which included

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<sup>4</sup> Examples can be found in any book on primitive customs and laws. See CHERRY, *THE GROWTH OF CRIMINAL LAW IN ANCIENT COMMUNITIES* (1890). An interesting provision from the Code of Hammurabi (§ 110) illustrates the different mores of that civilization: "If a votary [probably, woman] open a tavern, or enter a tavern for the purpose of drinking, that woman shall be burnt to death." Quoted in 1 KOCOUREK & WIGMORE, *SOURCES OF ANCIENT AND PRIMITIVE LAW* 408 (1915).

<sup>5</sup> "Primitive law could not measure its blows; he who defied the law was outside it. An outlaw was treated as a wild beast whom any man might slay. He had ceased to be a member of the community because he failed to observe its laws. Such a punishment represents an early stage in the life of a community." POTTER, *HISTORICAL INTRODUCTION TO ENGLISH LAW* 347 (4th ed. 1958). "He who breaks the law has gone to war with the community; the community goes to war with him. It is the right and duty of every man to pursue him, to ravage his land, to burn his house, to hunt him down like a wild beast and slay him . . ." 2 POLLOCK & MAITLAND, *THE HISTORY OF ENGLISH LAW* 449 (2d ed. 1923). See also CHERRY, *op. cit. supra* note 4, at 8.

<sup>6</sup> In book IX of Homer's *Iliad*, Aias says to Achilles: "Yet doth a man accept recompense of his brother's murderer or for his dead son; and so the man-slayer for a great price abideth in his own land, and the kinsman's heart is appeased and his proud soul, when he hath taken the recompense."

<sup>7</sup> "If a man steal an ox, or sheep, or ass, or pig, or boat, from a temple or palace, he shall pay thirty-fold; if it be from a freeman, he shall pay tenfold." Code of Hammurabi § 8, quoted in 1 KOCOUREK & WIGMORE, *op. cit. supra* note 4, at 391. "If a man shall steal an ox, or a sheep, and kill it, or sell it; he shall restore five oxen for an ox, and four sheep for a sheep." *Exodus* 22:1.

provisions for the awarding of damages to those who had been injured. This development occurred over several centuries and was extended throughout the various cultures of Europe. Therefore, it is impossible to present accurately the rules of damages under Roman law except by tracing their historical growth as modified in the various geographical areas in which the rules were applied. However, in many ways the approach of the Romans to the problem of damages approximates some of our present principles. For example, in the law of obligations, recovery was sometimes allowed for both the immediate injury (called *damnum emergens*) and for consequential injury, such as loss of profits (called *lucrum cessans*).<sup>8</sup> In other situations, the Roman approach to damages was substantially different from that of the present-day American court. For some delictual actions, the recovery was primarily penal, with a sum of money being paid to the injured party (in addition to restoration of any property taken) as a ransom to free the wrongdoer.<sup>9</sup>

Although the study of the Roman law of money recoveries is a rewarding effort, a detailed presentation is unnecessary for the purposes of this article. The primary reason for so summarily dismissing these many centuries of legal growth is that they had little direct influence on the shaping of Anglo-American law. The fall of the Roman empire also marked the fall of the Roman legal system, and only a few of its ideas of law, including damages, were transported into England. Instead, the same process of growth had to be repeated in England over several additional centuries, and although this growth in many ways paralleled that of Rome, it developed without the benefit of countless lessons which could have been learned through a careful study of Roman history.<sup>10</sup>

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<sup>8</sup> LEE, *THE ELEMENTS OF ROMAN LAW* 394 (4th ed. 1956).

<sup>9</sup> NICHOLAS, *ROMAN LAW* 209 (1962); RADIN, *ROMAN LAW* 127 (1927). The Romans also had an interesting method of valuing some property injuries. The highest value during a prior relatively long period of time was selected. For example, if a slave or four-footed beast was wrongfully killed, the wrongdoer was required to pay the owner the highest value during the year prior to the killing. 2 MUNRO, *THE DIGEST OF JUSTINIAN* 117 (1909) (translation of *DIGEST* 9.2.2). See the interpretation of this provision in LEE, *op. cit. supra* note 8, at 393-98. Thus, if the slave had suffered a disabling accident within the year prior to the wrongful killing, "damages" to the owner for the killing would be computed on the basis of the value of that slave prior to the disabling injury.

<sup>10</sup> There was a period during the eleventh through the thirteenth centuries when a study of Roman law appears to have influenced the English lawyers at the royal court. From that point on, the Roman legal background had no appreciable influence on the development of English law. 2 HOLDSWORTH, *HISTORY OF ENGLISH LAW* 177 (3d ed. 1923). However, it was during the twelfth century (ca. 1166) that the assize of

### B. Early Forms of Anglo-American Monetary Payments

The Anglo-American law of damages had its beginnings in the customs and orders of the Anglo-Saxons, well before the Norman Conquest in 1066 A.D. These customs and orders once provided for the practice of outlawry for civil wrongs, a practice common to all early "legal" systems.<sup>11</sup> There were also feuds — a refinement of outlawry — in which the law allowed only the injured person or his family to wage private war on the wrongdoer. Fairly definite rules evolved concerning feuds and as to what members of the wrongdoer's family were either inside or outside of the law's protection. Gradually, an amount of money was set to atone for the wrong done, but at first there was no requirement that the wrongdoer pay the amount. He could, at his option, either continue the feud or pay the money.<sup>12</sup> However, probably first by social pressure and then through public decree, these amounts of money (called *wer*, *wite*, or *bot*)<sup>13</sup> became accepted in place of outlawry for most civil wrongs. A growing number of wrongs were atoned for by the payment of *bot* to the person harmed; nevertheless, if the wrongdoer either would not or could not pay the fixed amount, outlawry remained as punishment.<sup>14</sup>

The *bot* was not, however, the equivalent of what is today called damages because the scale of payment was fixed. There could be no dispute over the amount to be awarded. In this sense, the recovery was penal. An example of this type of money recovery can be found in the laws of Ethelbert (ca. 600) which carefully specified the *bot*

novel disseisin was instituted. This was probably the earliest action in which damages could be sought. One writer has indicated that this assize was an adaptation of an older Roman interdict. See Woodbine, *The Origins of the Action of Trespass* (pts. 1-2), 33 YALE L.J. 799 (1924), 34 YALE L.J. 343 (1925).

<sup>11</sup> PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 385 (5th ed. 1956). The process of outlawry was also used to compel the defendant to submit to the jurisdiction of the court, the courts having only doubtful authority over defendants not actually appearing in the case. If the defendant continued to absent himself from the court, outlawry was used as a sanction against him. Outlawry was also used in criminal proceedings as a penalty for violent resistance to legal process or persistent contempt of court. 1 POLLOCK & MAITLAND, *op. cit. supra* note 5, at 49.

<sup>12</sup> *Id.* at 48.

<sup>13</sup> There was a technical distinction between the *wer*, the *wite*, and the *bot*. The *wer* (or *weregild*) was the value set on a man's life; the *wite* was the penal fine paid to a public authority; and the *bot* was the general word which included compensation of any kind. A wrong which could not be atoned by the payment of money was called *botleas*. See *ibid.*

<sup>14</sup> See 2 *id.* at 449-51.

to be paid for each injury.<sup>15</sup> Professor Ames captured the spirit of these early measures of recovery in this manner:

The pecuniary compensations and fines are set forth with great precision and minuteness in the Salic law. One could tell to a shilling just what it would cost to kill one's neighbor's cow, or even the neighbor himself. If the latter was a free man the compensation was two hundred shillings; if a slave, twenty-five shillings; if a royal official, six hundred shillings. Similarly there was a fixed price for a broken nose or an eye knocked out.<sup>16</sup>

## II. THE GROWTH OF THE JURY SYSTEM AS AN INFLUENCE ON THE LAW OF DAMAGES

Contemporaneous with the Anglo-Saxon culture and prior to the Norman Conquest, there was an event taking place in the continental palace of the Frankish Kings which would affect the growth of the law of damages. Those rulers called into their "courts" a group of men to be used as counsel in many different matters, including litigation. At first these groups of men apparently were used only to establish royal prerogatives; however, when the practice was transplanted to England following the Norman Conquest, these groups became juries, and their role gradually changed from that of counsellors to the Frankish kings to that of protectors of the public.<sup>17</sup>

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<sup>15</sup> If a shoulder be lamed, let bot be made with XXX shillings. . . . If an ear be struck off, let bot be made with XII shillings. . . . If the other ear hear not, let bot be made with XXV shillings. . . . If an ear be pierced, let bot be made with III shillings. . . . If an ear be mutilated, let bot be made with VI shillings. . . . If an eye be (struck) out, let bot be made with L shillings. . . . If a mouth or an eye be injured, let bot be made with XII shillings. . . . If the nose be pierced let bot be made with IX shillings. . . . If it be one ala let bot be made with III shillings. . . . If both be pierced, let bot be made with VI shillings. . . . If the nose be otherwise mutilated, for each let bot be made with VI shillings. . . . If it be pierced, let bot be made with VI shillings. Quoted in POUND & PLUCKNETT, READINGS ON THE HISTORY AND SYSTEM OF THE COMMON LAW 46 (3d ed. 1927).

Further sections set a price for the chin-bone, front teeth, back teeth, speech, collar bone, a thumb, a thumb nail, shooting finger, as well as for stabbing through an arm, the breaking of an arm, disfigurement of the face, bruises, bruises covered by clothes, bruises not covered by clothes, and so on. There is no question but that the modern lawyer would have an interesting time attempting to construe some of these sections as they applied to specific injuries.

<sup>16</sup> AMES, LECTURES ON LEGAL HISTORY 39 (1913). See also 1 SEDGWICK, DAMAGES 6-10 (9th ed. 1913).

<sup>17</sup> It was earlier thought that the jury was of Anglo-Saxon origin. However, the studies — particularly of Brunner — indicate that this is not the case and that the Frankish *inquisitio* was undoubtedly the forerunner of the English and American jury. 1 POLLOCK & MAITLAND, *op. cit. supra* note 5, at 140-42. The twelve thegns of Anglo-Saxon law may have been the origin of the grand jury but not the petit jury. POTTER, *op. cit. supra* note 5, at 240.

### A. *Money Payments as Compromises*

There is no need to trace the history of the jury, for this has been admirably done by other writers.<sup>18</sup> It is sufficient to point out that, up to the twelfth century, the juries which were used had no control over the recovery of damages. The reason was simple: there was no action through which damages could be recovered. Specific relief and outlawry could be decreed, but there was no form of action for asking the jury to set damages. It is true that many lawsuits resulted in the defendant paying money to the plaintiff, but these payments were by way of compromise — that is, after the court directed the defendant to do a certain act, the parties “compromised” by substituting a money payment for the court decree. Evidently, this practice of compromising had judicial sanction. The following case is reported in the Shropshire Eyre in 1203:

Sibil, Engeland's daughter, appeals Ralph of Sanford, for that he in the king's peace and wickedly and in breach of the peace given to her in the county [court] by the sheriff, came to the house of her lord [or husband] and broke her chests and carried off the chattels, and so treated her that he slew the child that was living in her womb.

Afterwards she came and said that they had made a compromise and she withdrew herself, for they have agreed that Ralph shall satisfy her for the loss of the chattels upon the view and by the appraisement of lawful men; and Ralph has assented to this.<sup>19</sup>

Notice how the result of this litigation differs from the payment of *bot* and how it approximates the result which would be reached today, at least as to property loss. The compromise gave Sibil the value of the chattels. However, the determination of value was not controlled by the court but was left to an outside appraisement.

### B. *Original Actions for Damages*

It will undoubtedly never be known what the first action for damages was. People in those early centuries were not interested in leaving a written record of their efforts. However, there is substantial evidence that the action for damages resulted from an action created by the assize of novel disseisin, instituted in the middle of the twelfth century (ca. 1166).<sup>20</sup> This assize provided for a recov-

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<sup>18</sup> See PLUCKNETT, *op. cit. supra* note 11, at 106-38; POUND & PLUCKNETT, *op. cit. supra* note 15, at 134-77; THAYER, EVIDENCE AT THE COMMON LAW 47-262 (1898).

<sup>19</sup> 1 SELECT PLEAS OF THE CROWN 32 (No. 73).

<sup>20</sup> Woodbine, *supra* note 10, 33 YALE L.J. at 807, 34 YALE L.J. at 343.

ery of possession of land as well as of chattels connected with the land. When the chattels could not be restored, damages were awarded as an alternative.<sup>21</sup>

The use of damages as a remedy soon spread to other forms of action, chief among which were the various types of trespass actions which, in turn, were probably related to the assize of novel disseisen.<sup>22</sup> With the widespread use of these actions, the courts possessed nearly all of the tools which were needed to develop damages as the normal basis for judicial relief. The *wer* and the *bot* of the Anglo-Saxons had suggested the concept of using money rather than the feud to assuage the wronged; actions seeking money recovery had been initiated and developed by the court; the jury was available to introduce flexibility into the determination of the amount of money to be awarded; and, perhaps through the compromise, the basis of recovery was shifting from that of punishment to that of compensation. All that remained was the need for a control over verdicts so that the judicial system could have a reasonable assurance that juries would seek to compensate the injured person rather than to punish either of the parties.

### C. *Dual Function Served by the Jury*

The jury of the early middle ages performed functions substantially different from those of the twentieth century petit jury. The medieval jury was one of both trial and accusation and could also be called together when the king wanted information. For example, the early jurors might be asked to name all of the land owners in their district and to list the amount of land owned by each.<sup>23</sup> Juries of this time are generally described as "twelve lawful knights."<sup>24</sup> For the grand assize, they were elected by four knights who had been summoned by the sheriff, whereas for the petty assizes, the jurors were selected by the sheriff without the intervention of electors.

These jurors were not expected to reach an objective verdict based solely upon the evidence presented by witnesses of the parties' choos-

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<sup>21</sup> POTTER, *op. cit. supra* note 5, at 354.

<sup>22</sup> For other theories as to the origin of the action of trespass, see PLUCKNETT, *op. cit. supra* note 11, at 369-72.

<sup>23</sup> 1 POLLOCK & MAITLAND, *op. cit. supra* note 5, at 139.

<sup>24</sup> See 2 *id.* at 621-22. Calling the jury "twelve lawful knights" represents a later development in the history of juries, because not all of the first juries were composed of twelve men. In the early middle ages, there appears to have been no set number for the jury. There is evidence of juries with as few as nine and as many as eighty-four jurors. PLUCKNETT, *op. cit. supra* note 11, at 120; THAYER, *op. cit. supra* note 18, at 86.



ing. Instead, the medieval jury was a body of neighbors, many of whom had first-hand knowledge of the transaction involved. They rendered their verdict not only on the basis of what they heard and saw in court (there often were some outside witnesses testifying as to portions of the transaction) but also on the basis of their own knowledge and, sometimes, independent investigation. Thus, these jurors performed both a witnessing and a judging function.<sup>25</sup>

At first the trial jury, as distinguished from the accusing or informing jury, was probably used to determine whether the complainant or the defendant had the greater right to a certain piece of land the title to which was in dispute.<sup>26</sup> However, as trespass actions began to result in damage recoveries, the jury was used to set the amount of damages. Because the juries were acquainted with the facts and because no attempt had been made to present witnesses who testified as to the entire transaction, there was no basis for the trial judge or for the appellate courts to revise an award of damages which was claimed to be either insufficient or excessive. The jury of the middle ages was no longer simply an advisor as to the amount of damages; courts had come to consider jurors as "chancellors" as to the amount of damages to be awarded in a law suit.<sup>27</sup>

### III. PRINCIPAL FORCES CONTROLLING THE JURY VERDICT

Despite statements by judges as to the supremacy of the jury in determining damages, there were two principal forces which tended to control the verdict. One of these was the process of attain which was widely employed during the thirteenth and fourteenth centuries

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<sup>25</sup> 2 REEVES, HISTORY OF ENGLISH LAW 118-35 (New Am. ed. 1880). THAYER, *op. cit. supra* note 18, at 90 *passim*. These jurors were "witnesses" who had been selected (at least indirectly) solely by the court; they were not chosen by the parties. 2 POLLOCK & MAITLAND, *op. cit. supra* note 5, at 622-26. Further, the twelfth century jury did not "judge," in that its decision (which did not need to be unanimous, see THAYER, *op. cit. supra* note 18, at 86) was probably only advisory to the court. 1 POLLOCK & MAITLAND, *op. cit. supra* note 5, at 139-40.

<sup>26</sup> For example, a 1200 case involved a claim to "one hide of land with appurtenances in Morland" by Galiena against her brother, William. Galiena claimed the land descended from her mother and not from the side of her father. Forty shillings were offered by Galiena to the king to have a jury determine whether the land "ought to descend to her from her mother's side, or to William from his father's side." The jury decided in favor of Galiena and the order was: "Let Galiena have her seisen thereof." 1 SELECT CIVIL PLEAS 1 (No. 1).

<sup>27</sup> *Hixt v. Goats*, 1 Rolle 257 (K.B. 1615). There is another theory as to why jury verdicts became binding on the courts. Jury trial was only one of competing methods of trial. When the parties agreed to "put themselves on the country" (that is, to submit the case to the jury) rather than, for example, to wage their law, they had made a binding election. The judges could not then change the method of trial. See discussion of this theory in 2 POLLOCK & MAITLAND, *op. cit. supra* note 5, at 623.

but which gradually fell into disuse during the later centuries; the second was a growing reaction that there should be some legal principles against which the amount of damages awarded could be tested. This second force, of which is found only traces in the early cases, survived the changing function of the jury and became, by the eighteenth century, the basis for a law of damages.

#### *A. Criminal Punishment of Jurors Through Attaint*

One of the most interesting relics from legal history is the process of attaint to control a jury's decision. While there were different ways in which to convict the jury of having reached a false decision,<sup>28</sup> the one most often described, and thus probably the most often used, was that of calling twenty-four other jurors who would reconsider the original case.<sup>29</sup> If they found that the first jury of twelve had reached a false verdict, that verdict was set aside and the first jury punished. The jurors were thrown into prison, their lands and goods were seized by the king, and they were "branded with perpetual infamy."<sup>30</sup> Fortesque reports in even stronger (and more colorful) language by remarking that if it was found that the original panel made a false oath,

every one of the first Jury shall be committed to the King's prison, their goods shall be confiscated, their possessions seized into the King's hands, their habitations and houses shall be pulled down, their wood-lands shall be felled, their meadows shall be plowed up and they themselves ever thenceforward be esteemed, in the eye of the law, infamous, and in no case whatsoever are they to be admitted in testimony of the truth; the party who suffered in the former trial, shall be restored to everything he lost through occasion of such false verdict.<sup>31</sup>

While this appears to be a rather stern penalty for a jury reaching a decision which was later determined to be erroneous, there is

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<sup>28</sup> 2 REEVES, *op. cit. supra* note 25, at 161-66.

<sup>29</sup> An early reported case involving attaint was tried at Lincolnshire Eyre in 1202. Hugh and Robert disputed seisin to a parcel of land in Withern. The jury determined that Hugh should "have his seisen, and Robert is in mercy for the unjust detention. Robert offers to the King forty shillings to have the oath of twenty-four knights to convict the jurors." 1 SELECT PLEAS OF THE CROWN 88 (No. 216). An even earlier case is *Gundulf v. Pichot*, decided some time between 1066 and 1087. The case is reported in BIGELOW, *PLACITA ANGLO NORMANNICA* 34 (1879), and discussed in THAYER, *op. cit. supra* note 18, at 51-52.

<sup>30</sup> 2 REEVES, *op. cit. supra* note 25, at 165.

<sup>31</sup> Chapter 26 of FORTESQUE, *DE LAUDIBUS LEGUM ANGLIAE* (ca. 1468), translated by Gregor and appearing in revised version in POUND & PLUCKNETT, *op. cit. supra* note 15, at 159.

theoretical justification for criminal punishment of jurors in a system in which the jurors also performed a witness function. In effect the punishment was for perjury. As the nature of the jury's function changed to that of fact determination and as the witness function was dropped, the process of attainder became inapplicable and gradually disappeared from English law. There was also an understandable reluctance on the part of the second jury to impose such a harsh penalty on their neighbors. Therefore, certainly by the sixteenth century, attainder was no longer an effective control of juries.

The attainder did not build any body of principles which could be described even generally as a law of damages. The attaining jury acted from its own knowledge, as had the first jury, and was not bound to follow any instructions from the judge. Because the second jury could not, in turn, be attainted, its decision was final. Furthermore, attainder was limited to decreasing an excessive damage verdict; it could not be used to challenge an inadequate award.<sup>32</sup> The lasting effect, then, of the process of attainder was severely restricted, although its threat was probably very real during at least the thirteenth and fourteenth centuries.

#### B. "Cognizance" as the Basis of Judicial Review

The date when a law of damages began to appear is subject to honest dispute. However, it is most probable that such a body of principles can loosely be traced to an idea of "cognizance." Briefly stated, that idea was this: if the injury was in the sole cognizance of the jury (for example, injury to land which had been viewed by the juror-witnesses and could not be seen by the judge), the jury's determination would not be revised by the judge. In such a case, attainder was the only relief for an excessive verdict and, as has been pointed out, this possibility did not hold out much hope for the defendant. If, instead, the injury was one which could also be viewed by the judge (as an injury to the person with the person being brought into court), the judge could revise an excessive verdict. Many early cases illustrate this idea, but a representative one will suffice. In 1622, an action was decided in King's Bench involving what today is termed slander.<sup>33</sup> The suit arose from the

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<sup>32</sup> For an excellent article concerning the growth of the law of damages and the influence which attainder played in this growth, see Washington, *Damages in Contract at Common Law*, 47 L.Q. REV. 345 (1931).

<sup>33</sup> *Hawkins v. Sciet*, Palmer 314, 81 Eng. Rep. 1099 (K.B. 1622). The case is quoted from BEALE, *CASES ON DAMAGES* 2 (3d ed. 1928).

defendant's having falsely called the plaintiff a bankrupt, and the jury awarded the plaintiff £150 in damages. After stating these facts, the opinion continues:

[A]nd for this great damage the court, by reason of certain circumstances, reduced them [the damages] to £50. But afterwards, upon great consideration, they revoked this, and would not change the course of the law; and resolved to leave such matters of fact to the finding of the jury, which better knows the quality of the persons and their estate, and the damage that they may sustain by such disgrace. Otherwise where the action is grounded on a cause which may appear in the sight of the court, so that they may judge of it, as in mayhem, &c. And so is Dyer, 105. And therefore they give judgment on the verdict for £150.<sup>34</sup>

Here is a requirement that the determiner of damages have certain knowledge (that is, cognizance) of the amount of damages. With the passage of time, this requirement was reshaped, finally to become a principle that the amount of damages must be proved with certainty to the trier of fact — "certainty" being defined more strictly in contract actions than in tort actions<sup>35</sup> — and one of the first "rules" of damages emerged.<sup>36</sup>

### C. *Granting of a New Trial as a Control Over the Jury*

The method by which this rule of cognizance developed only roughly parallels the development of legal rules today. The seventeenth-century court was less concerned with searching out general principles of law than it was with seeking some method of controlling jury verdicts, since attain had all but disappeared.<sup>37</sup> The principal method finally devised was the granting of a new trial before a new jury.<sup>38</sup>

The granting of new trials is today commonplace, but the

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<sup>34</sup> *Ibid.*

<sup>35</sup> The language of cognizance of the jury was repeated in *Wilford v. Berkeley*, 1 Burr. 609, 97 Eng. Rep. 472 (K.B. 1758), a criminal conversation case. The jury had awarded the plaintiff an amount which was ten times the defendant's annual salary, but a new trial was denied. In 1774, Common Pleas stated: "In contract the measure of damages is generally matter of account, and the damages given may be demonstrated to be right or wrong. But in torts a greater latitude is allowed to the jury: and the damages must be excessive and outrageous to require or warrant a new trial." *Sharpe v. Brice*, 2 Bla. W. 942 (C.P. 1774).

<sup>36</sup> This growth is traced in Washington, *supra* note 32, at 351-66.

<sup>37</sup> "Though the field of damages was one of several where the lack was felt most severely, the whole development of the common law system was hampered and retarded for want of some simple and effective means of controlling the jury." *Id.* at 358.

<sup>38</sup> The history of granting a new trial is traced in THAYER, *op. cit. supra* note 18, at 168-82.

acquisition of that power by early courts, especially in damage cases, required considerable ingenuity on the part of the seventeenth century lawyer. The difficulty centered upon the fact that jurors still served the dual role of witnesses and judges. Jurors were allowed to act on evidence about which the court knew nothing.<sup>39</sup> However, a new trial had been granted in *Wood v. Gunston*<sup>40</sup> for an award which the defendant claimed was excessive. Although the *Wood* case cautiously added that "indirect dealings" may cause the jury to side with one party rather than being "indifferent betwixt them"<sup>41</sup> and although the decision was made during the period of the Commonwealth, the idea of granting a new trial was to become one of the principal devices for controlling jury verdicts. Thus, in 1757, Lord Mansfield, noting that attaind had become a "mere sound" in every case, and in many cases did not even pretend to be a remedy, concluded that "It is absolutely necessary to justice, that there should, upon many occasions, be opportunities of reconsidering the cause by a new trial."<sup>42</sup>

#### D. *Development of Basic Principles Regarding the Amount of Damages*

With the development of the power to award new trials and with the addition of other controls over juries, notably rules of evidence and jury instruction,<sup>43</sup> the court was in a position to develop principles relating to the amount of damages which could be recovered. These principles did not come quickly. The lawyer and the court were still operating under a writ system in which the attention of the common law lawyers was directed toward matters which today would be called procedural; they did not think in terms of substantive law. Thus, neither the lawyer presenting the case nor the judge deciding it was particularly concerned about developing general principles applicable to the measurement of damages. However, as the writ system lost its hold on the courts and as the power to grant new trials became generally accepted in the legal system, lawyers began to think in terms of legal principles

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<sup>39</sup> Bushel's Case, Vaughn 135 (C.P. 1670).

<sup>40</sup> Style 466, 82 Eng. Rep. 867 (Upper Bench 1655).

<sup>41</sup> *Ibid.*

<sup>42</sup> Bright v. Eynon, 1 Burr. 390, 393, 97 Eng. Rep. 365, 366 (K.B. 1757).

<sup>43</sup> 1 WIGMORE, EVIDENCE §§ 4, 8 (3d ed. 1940); THAYER, *op. cit. supra* note 18, at 112.

applicable to large groups of cases.<sup>44</sup> It was at this time that a law of damages began to emerge.

#### IV. FORMULATION OF GENERAL DAMAGE RULES

##### A. *Breach of Contract*

Suits involving breach of a contract promise were among the early cases in which the court sought to state general damage rules. At first it was indeterminable whether the nonbreaching party's expectation interest or his restitution interest merited primary protection. In *Flureau v. Thornhill*,<sup>45</sup> the plaintiff agreed to purchase real estate<sup>46</sup> and paid in advance twenty percent of the purchase price. When title was checked, a defect was discovered which evidently could not be removed. The plaintiff sued for the down payment — which the seller was quite willing to return, having previously tendered the down payment *and interest* into court — and "insisted on a farther sum for damages in the loss of so good a bargain."<sup>47</sup> The jury, contrary to the court's instructions, awarded damages for the plaintiff's loss of bargain. In granting a new trial, the court formulated this rule:

De Grey, C. J. — I think the verdict wrong in point of law. Upon a contract for a purchase, if the title proves bad, and the vendor is (without fraud) incapable of making a good one, I do not think that the purchaser can be entitled to any damages for the fancied goodness of the bargain, which he supposes he has lost. . . .

Blackstone, J., of the same opinion. — These contracts are merely upon condition, frequently expressed, but always implied, that the vendor has a good title. If he has not, the return of the deposit, with interest and costs, is all that can be expected.<sup>48</sup>

There are many interesting ideas in these sentences: (1) The court made no attempt to give reasons for its conclusion; justification was to come nearly a century later, long after the *Flureau* rule had become firmly imbedded in English law.<sup>49</sup> (2) Justice

<sup>44</sup> PLUCKNETT, *op. cit. supra* note 11, at 353-82.

<sup>45</sup> 2 Bla. W. 1078, 96 Eng. Rep. 635 (C.P. 1776).

<sup>46</sup> Plaintiff (the buyer) purchased at auction a rent for a term of thirty-two years arising out of a leasehold. The price was £270 (stated as £207 in one place in the report), of which plaintiff paid £54 down.

<sup>47</sup> 2 Bla. W. at 1078, 96 Eng. Rep. at 635.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Bain v. Fothergill*, L.R. 7 H.L. 158 (1874). One justification for continuing the rule of *Flureau v. Thornhill* was the practice of conveyancers and "the common dealings of mankind." However, Lord Hatherly also relied on the unsatisfactory conditions of titles in England, and this may have been the basis on which Blackstone suggested his implied condition.

Blackstone's use of the doctrine of implied condition to limit the scope of a promise arose during a period when English courts were reappraising and formulating a doctrine of implied conditions.<sup>50</sup> (3) The statement "fancied goodness of the bargain" is explainable when considered in relation to the plaintiff's approach to recovery. The loss of bargain which the plaintiff sought to recover was evidently not the difference between the market value of the real estate and the contract price but was, instead, the difference between the selling price of stock (which the plaintiff had liquidated in order to make the purchase) at the time of the sale and the price of that stock at the time the plaintiff learned that the defendant did not have good title to the real estate.<sup>51</sup> (4) The "without fraud" limitation has given this general rule of damages a flexibility which has been used to suggest substantial restriction of the rule's application.<sup>52</sup> Nevertheless, the court's choice of protecting the restitution rather than the expectation interest when a vendor is unable to convey a good title has left its imprint on this type of case, both in England and in this country.<sup>53</sup>

The plaintiff's contract expectation interest was not overlooked. The judges were of the opinion that some method had to be found to frame a general principle which would explain when a nondefaulting party could recover those gains which he would have made had the contract been performed. The idea of "certainty" was available, but this was a hindsight test. If the nondefaulting party could prove his losses with certainty (whatever this term might mean<sup>54</sup>), should the defaulting party be liable for those losses

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<sup>50</sup> See *Kingston v. Preston*, 2 Doug. 689 (K.B. 1773); *Boone v. Eyre*, 1 H. Bl. 273, 126 Eng. Rep. 160 (1777).

<sup>51</sup> A portion of Blackstone's opinion dealt with this problem but concluded: "Not that this is material; for the plaintiff had a chance of gaining as well as losing by a fluctuation of the price." 2 Bla. W. at 1079, 96 Eng. Rep. at 636.

<sup>52</sup> MCCORMICK, DAMAGES 689-91 (1935).

<sup>53</sup> The English cases are discussed in MAYNE & MCGREGOR, DAMAGES 393-411 (12th ed. 1961). Cases from the United States are summarized in 5 CORBIN, CONTRACTS § 1098 (1964). See *Hammond v. Hannin*, 21 Mich. 374 (1870), for an application of *Plureau v. Thornhill*.

An attempt to state a general rule for restitution protection came sixteen years before the *Plureau* decision in *Moses v. Macferlan*, 2 Burr. 1005, 97 Eng. Rep. 676 (K.B. 1760). There, Lord Mansfield explained the basis of quasi-contractual recovery in the setting of "the ties of natural justice." *Id.* at 1009, 97 Eng. Rep. at 678. Efforts to make restitution rules definite have defied the scholarship of two hundred years. DAWSON, UNJUST ENRICHMENT *passim* (1951).

<sup>54</sup> A casual reading of damage cases might lead to the conclusion that damages must be proved with a type of mathematical exactness. The law requires no such heavy burden. In this regard, see, e.g., *UMW v. Patton*, 211 F.2d 742 (4th Cir.), *cert. denied*, 348 U.S. 824 (1954); *Noble v. Tweedy*, 90 Cal. App. 2d 738, 203 P.2d 778.

even if he had no way reasonably to anticipate that those losses would result from a breach? At first, the answer appeared to be in the affirmative.<sup>55</sup> However, in the middle of the nineteenth century another step was taken to give the judges further control over the verdicts of juries. In the famous *Hadley v. Baxendale*<sup>56</sup> decision, Baron Alderson remarked:

Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.<sup>57</sup>

Once again a jury verdict was set aside for a new trial, perhaps even at the expense of misreading the facts of the case.<sup>58</sup>

(1949); *Naeger v. Naeger*, 339 S.W.2d 492 (Mo. App. 1960). "It is sufficient if a reasonable basis of computation is afforded, although the result be only approximate." *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 379 (1927). See also *Wright v. Ickenroth*, 215 S.W.2d 43 (Mo. App. 1948). The principle of certainty should be nothing more than a statement about the provability of a claim used to control verdicts based upon speculation. See cases cited in 22 AM. JUR. 2D *Damages* § 22 (1965).

<sup>55</sup> *Black v. Baxendale*, 1 Ex. 410, 154 Eng. Rep. 174 (1847). In that case a carrier delayed in shipping goods. No notice had been given to the carrier that it was necessary that the goods arrive at a certain time. The jury returned a verdict for the damages caused by the delay. The carrier moved for a new trial on the ground that the carrier had no notice of the purpose for which the goods were sent, but the motion was denied. "Parke, B. I think there ought to be no rule. The defendants are responsible only for reasonable consequences of their breach. It was a question for the jury whether it was reasonable and proper to send a man down to Bedford to look after the goods." *Id.* at 411, 154 Eng. Rep. at 175.

<sup>56</sup> 9 Ex. 341, 156 Eng. Rep. 145 (1854).

<sup>57</sup> *Id.* at 354, 156 Eng. Rep. at 151.

<sup>58</sup> The head-note [to *Hadley v. Baxendale*] is definitely misleading in so far as it says that the defendant's clerk, who attended at the office, was told that the mill was stopped and that the shaft must be delivered immediately. The same allegation figures in the statement of facts which are said on page 344 to have "appeared" at the trial before Crompton J. If the Court of Exchequer had accepted these facts as established, the court must, one would suppose, have decided the case the other way round; must, that is, have held the damage claimed was recoverable under the second rule. But it is reasonably plain from Alderson B's judgment that the court rejected this evidence. *Victoria Laundry (Windsor) Ltd. v. Newman Indus. Ltd.* [1949] 2 K.B. 528, 537 (C.A.), restating the rule of *Hadley v. Baxendale*.

See 5 CORBIN, *op. cit. supra* note 53, §§ 1006-13, for an analysis of the foreseeability doctrine. The value of the *Hadley v. Baxendale* decision lies not in any requirement of actual foreseeability of special harm, but in its basic premise that not all losses are to be shifted from this plaintiff to this defendant. The case is an excellent example of the increasing control of courts over the discretion of juries. Other statements of the rule have appeared in this country: *Globe Ref. Co. v. Landa Cotton Oil Co.*, 190 U.S. 540



## B. Tort Actions

Damage rules were also being developed in the area which lawyers now refer to as torts.<sup>59</sup> The suggestion from Shropshire Eyre in 1203<sup>60</sup> that the owner of converted goods should be compensated by an award of the market value of those goods has been accepted as the standard measure of recovery. Personal injury actions — damages for which once lay in the particular ken of the jury — are now the subject of many damage rules.<sup>61</sup> These rules are based generally upon a notion of compensation, even when the loss sustained and the money awarded can not be equivalent.<sup>62</sup>

## V. CONCLUSION

The characteristic problems of each generation have exerted influence in shaping damage awards. Widespread use of automobiles as well as the impact of income taxes have had their effect on damage rules in mid-twentieth-century tort cases.<sup>63</sup> The implementation of the Uniform Commercial Code contract remedies concerning the sale of goods will require court attention in the last half of the century.<sup>64</sup> In meeting these challenges, courts will continue to use those principles which have been developing ever since the idea was conceived that there ought to be a better way to settle disputes than by outlawry. The principle of compensation rather than punishment, the flexibility of the jury award, and control by courts over the unreasonable jury verdict<sup>65</sup> — this is the "stuff" out of which a law of damages has been fashioned.

Perhaps there are legal scholars who object to labelling the

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(1903); *Lamkins v. International Harvester Co.*, 207 Ark. 637, 182 S.W.2d 203 (1944); *Kerr S.S. Co. v. Radio Corp. of America*, 245 N.Y. 284, 157 N.E. 140 (1927).

<sup>59</sup> *MAYNE & MCGREGOR, op. cit. supra* note 53, at 565-603.

<sup>60</sup> See text accompanying note 19 *supra*.

<sup>61</sup> These rules are discussed in *MCCORMICK, op. cit. supra* note 52, at 299-334; 22 AM. JUR. 2D *Damages* §§ 85-130 (1965).

<sup>62</sup> Recovery for pain and suffering is an example of a situation in which the injury and money are not in any sense the equivalents of each other; nevertheless, the law of damages allows *compensation* for pain and suffering. Cases are partially collected in *Annots.*, 81 A.L.R. 423 (1932), 85 A.L.R. 1010 (1933), 20 A.L.R.2d 276 (1951).

<sup>63</sup> See *Annot.*, 63 A.L.R.2d 1393 (1959).

<sup>64</sup> UNIFORM COMMERCIAL CODE §§ 2-703 to -715.

<sup>65</sup> The text has suggested only a few of the many principles of damages which have been developed. Other examples could have been chosen from such limiting rules as the requirement that damages be "direct" rather than "remote," the ideas of mitigation, and the doctrine of avoidable consequences. See generally *MCCORMICK, DAMAGES* (1935).

principles of damages as "law." There is no doubt that the application of damage rules still rests, in many cases, in the discretion of the jury. However, whether this body of knowledge is called "law" or simply "principles," it is nonetheless clear that the present Anglo-American system of awarding compensatory damages is an immeasurable improvement over the ancient practices of out-lawry and the inflexible concepts of *wer* and *bot*.<sup>66</sup>

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<sup>66</sup> The text statement contains several value judgments which could be the subject of other articles. Workmen's compensation statutes contain strong resemblance to the old *bot* concepts. However, even these statutes do not set a fixed amount for an injury (except through maximum amounts); they establish recoveries on the basis of the employee's earnings. See, e.g., 64 N.Y. WORKMEN'S COMP. LAWS § 15; OHIO REV. CODE § 4123.57; PA. STAT. ANN. § 513 (1952).